STATE OF MICHIGAN

COURT OF APPEALS

LESLIE LYNN CUMMINGS, also known as LESLIE LYNN DONOVAN,

Plaintiff-Appellee,

v

PAUL A. CUMMINGS,

Defendant-Appellant.

UNPUBLISHED
March 10, 2022

No. 358295
Kent Circuit Court
LC No. 18-004127-DM

Before: RIORDAN, P.J., and K. F. KELLY and SWARTZLE, JJ.

PER CURIAM.

Defendant, Paul A. Cummings, appeals by right the trial court's order granting plaintiff Leslie Lynn Cummings's motion to modify custody, parenting time, and child support. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant are parents of three minor teenage children and were divorced on March 11, 2019. The judgment of divorce awarded joint legal custody of the children and defendant was awarded sole physical custody. Plaintiff was given parenting time every other weekend and every Wednesday night.

Both parties subsequently filed motions to modify parenting time, and plaintiff also sought a modification to custody. After a hearing, the trial court granted plaintiff's motion and denied defendant's. With respect to custody, the trial court found that there had been a change in circumstances because the order prohibiting plaintiff's boyfriend—a registered sex offender—from being present during her parenting time had been lifted. The trial court also determined that a custodial environment existed with both parties and it was in the children's best interest to grant plaintiff's motion to modify custody. As relevant to this appeal, the trial court determined that best-interest factors (f) (moral fitness of the parties) and (j) (willingness to facilitate parental relationship) favored plaintiff, and factor (h) (home and school record of children) favored each party equally. Accordingly, the trial court ordered that both parties would share physical custody and parenting time. This appeal followed.

II. STANDARDS OF REVIEW

This Court applies three standards of review in child custody cases. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Vodvarka v Grasmeyer*, 259 Mich App 499, 507-508; 675 NW2d 847 (2003) (quotation marks and citations omitted).]

The trial court abuses its discretion when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Fletcher v Fletch*er, 447 Mich 871, 879-880; 526 NW2d 889 (1994) (quotation marks and citation omitted). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Seifeddine v Jaber*, 327 Mich App 514, 516; 934 NW2d 64 (2019) (citation omitted).

III. DISCUSSION

First, defendant argues that the trial court improperly concluded that a custodial environment existed with both parties because the evidence did not support that plaintiff had established a custodial environment with the children. We disagree.

Under MCL 722.71(1)(c), if a dispute over child custody arises out of another action, the trial court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances . . . ." The party seeking to modify or amend the order must "establish proper cause or change in circumstances, [otherwise] the court is precluded from holding a child custody hearing . . . ." *Vodvarka*, 259 Mich App at 508. "The movant . . . has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists before the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors." *Id*. at 509.

"The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). This Court has described an established custodial environment as "one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). A custodial environment is "marked by security, stability, and permanence." *Id*. A child can have an established custodial environment with both parents. *Id*. at 707.

The trial court determined that a custodial environment existed with both parents, primarily because of the children's age and recency of the divorce. The trial court also heard testimony that the children relied on plaintiff for care, felt secure with plaintiff when sleeping in her home, and received love from plaintiff. Additionally, at the time of the hearing, the children had permanence in defendant's home, were disciplined by defendant, and sought guidance from defendant. The testimony in this case was sufficient to demonstrate that the children had a custodial environment with both parents because the children looked to both parents for care, discipline, love, guidance, and attention, while both custodial environments presented security, stability, and permanence. See *Berger*, 277 Mich App at 706. Thus, the trial court did not abuse its discretion when it determined that a custodial environment existed with both parties.

Next, defendant argues that the trial court erred when it determined the best-interest factors weighed in favor of plaintiff having equal parenting time. Specifically, defendant argues that the trial court erred in its evaluation of factors (f), (h), and (j).

A trial court must resolve custody disputes by determining what is in a child's best interests. MCL 722.26a(1)(a). The best-interest factors under MCL 722.23 are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. A court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a

child or that parent from sexual assault or domestic violence by the child's other parent.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

With respect to factor (f), the moral fitness of the parties involved, defendant asserts that the trial court did not give weight to the testimony of defendant's girlfriend, who stated that plaintiff admitted she was on a quest to "get her children back." Additionally, defendant argues that plaintiff intentionally told one of her children about an altercation defendant had with plaintiff's boyfriend in an effort to incite a fight between the child and defendant.

This Court has explained that "questionable conduct is relevant to factor f only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*." *Berger*, 277 Mich App at 712. "Examples of such conduct include, but are not limited to, verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Id*. at 713 (quotation marks and citation omitted). "Trial courts must look to the parent-child relationship and the effect that the conduct at issue will have on that relationship." *Id*. (quotation marks and citation omitted).

During the hearing, the trial court recognized defendant's past substance abuse with alcohol and his convictions for operating a vehicle while he was intoxicated. The trial court also recognized that plaintiff was in a relationship with a registered sex offender, but also took into consideration that defendant had instigated an altercation with plaintiff's boyfriend at a restaurant. Moreover, defendant's argument that the trial court did not consider the allegation that plaintiff may have informed one of the children about the altercation between defendant and plaintiff's boyfriend is without merit. The trial court explicitly took into consideration the incident, including the conflicting testimony regarding how the child obtained the information. Therefore, the trial court did not abuse its discretion when it determined that factor (f) favored plaintiff.

Next, defendant argues that the trial court erred by when it found that factor (j) favored plaintiff because the trial court did not consider the evidence that plaintiff "dictated" how parenting time ran. We disagree.

Factor (j) relates to "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). Contrary to defendant's argument, the trial court considered defendant's evidence that plaintiff "dictates rather than asks when it comes to parenting time, pick up/drop off, and related issues." The trial court found that even when it considered the evidence defendant put forth that plaintiff was "telling instead of asking," defendant failed to respond to the text messages from plaintiff that defendant claims are the evidence that plaintiff is unwilling to facilitate parenting time. Indeed, the trial court noted that defendant admitted to the Friend of the Court that at times, he was not "willing to commit to responding to [plaintiff] when she has reached out to him."

In other words, the trial court considered the testimony from both parties and weighed it in favor of plaintiff because the evidence demonstrated that defendant was the party who refused to communicate regarding her parenting time. This was not an abuse of the trial court's discretion.

Lastly, defendant argues that the trial court erred by determining that factor (h)—the home, school and community record of the children—favored both parties equally because the evidence demonstrated defendant was involved in the children's schooling, whereas the school's police officer testified that she had not seen plaintiff at the children's school. Again, we disagree.

The trial court considered that, while defendant had more opportunity to show an interest in the children's school because he was awarded sole physical custody and the children spent more time with him each week, plaintiff also demonstrated that she also had an interest in the children's school. Plaintiff testified she was in contact with the children's schools regarding their grades, attended the children's sporting events, and took a sincere interest in their extracurricular events. Plaintiff also testified that she attempted to work with defendant to improve the children's grades and performance in school. While the trial court also heard testimony from the school's police officer that she had not seen plaintiff, the trial court was within its discretion to credit plaintiff's testimony regarding the other means by which she participates in her children's home and school lives.

Affirmed. Plaintiff, as the prevailing party, may tax costs.

/s/ Michael J. Riordan
/s/ Kirsten Frank Kelly
/s/ Brock A. Swartzle